

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-37-0812

GREGORY LEE MURPHY, #355966

APPELLANT,

vs

STATE OF SOUTH CAROLINA,

RESPONDENT.

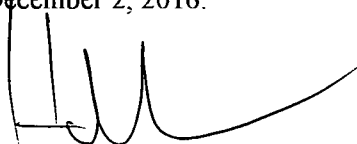
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S.C. SUPREME COURT

NOTICE OF APPEAL

Gregory Lee Murphy, #355966 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Edgar W. Dickson, Circuit Court Judge on July 28, 2014, and Order of Dismissal issued on October 26, 2016 and filed on November 28, 2016. The Appellant received Order of Dismissal on December 2, 2016.



Hugh W. Welborn
Attorney for the Appellant
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(864) 226-5787
Attorney for Gregory Lee Murphy, #355966

Other Counsel of Record:
Walt Whitmire
Office of Attorney General State of SC
Post Office Box 11549
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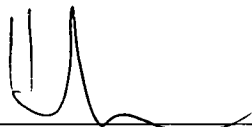
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S.C. SUPREME COURT

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on December 2, 2016 addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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Attorney for Gregory Lee Murphy, #355966

Anderson, South Carolina

November 02 20 16

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Gregory Lee Murphy,)
 S.C.D.C. No. 355966,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 2013-CP-37-0812

FILED OCONEE COUNTY, SC
 DECEMBER 11 2014
 11:30 AM
 2014 NOV 28 10 11 30

**ORDER OF DISMISSAL AND
 GRANT OF APPEAL PURSUANT TO
WHITE V. STATE¹**

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on November 8, 2013. Respondent filed its Return on July 11, 2014. An evidentiary hearing into the matter was convened on July 28, 2014, at the Oconee County Courthouse. Applicant was present at the hearing and was represented by Hugh W. Welborn, Esquire. Also present was Applicant's previous PCR counsel, Daniel Day, Esquire, who testified. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the March 2013 term of the Court of General Sessions for Oconee County for possession, manufacture, distribution, etc. of methamphetamine, second offense (2013-GS-37-312). The Applicant was represented by Daniel R. Day, Esq. Applicant proceeded to trial and was found guilty on June 26, 2013. He was convicted as indicted. The Honorable Alexander S.

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

Macaulay sentenced Applicant to twenty-five (25) years for possession, manufacture, distribution, etc. of methamphetamine, second offense. The Applicant did not appeal his conviction or sentence.

Allegations

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance Counsel, in that;
 - a. Counsel failed to file an appeal on Applicant's behalf,
 - b. Counsel failed to resolve a conflict of interest,
2. Prosecutorial Misconduct, in that;
 - a. Applicant's sentence was unlawfully enhanced,
3. Constitutional Violation, in that;
4. The indictment lacked a "True Bill" stamp, and this denies Applicant a fair and impartial trial.

At the evidentiary hearing, the Applicant also alleged counsel was ineffective for failing to adequately cross-examine his confidential informant, and failing to bring out that he was only smoking, not selling, meth.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony and evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the prior PCR proceedings, the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2016), this Court makes the following findings of fact and conclusions of

law based upon all of the probative evidence presented.

Ineffective Assistance of Counsel

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Solicitor's Conflict of Interest

Applicant first alleged counsel was ineffective in failing to resolve a conflict of interest. He testified that the prosecutor had a conflict of interest based on a prior DSS charge – he said he told counsel, but counsel did not do anything. Applicant alleged in his application that counsel was ineffective for failing to inform the court of the solicitor's previous involvement with Applicant and DSS family issues. He said the solicitor previously assisted DSS against Applicant. Applicant further alleged in his application that the trial court knew that the solicitor had previously assisted DSS as a lawyer against Applicant, and that he could not be impartial.

This allegation is without merit. Counsel has no duty to make frivolous motions or objections. See Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994) (A lawyer's zeal on behalf of his client does not require him to file a motion which he knows to be meritless on the facts and the law). Applicant has also failed to show any prejudice from the solicitor's alleged conflict. See, e.g., State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007) (situation where investigator in solicitor's office previously interviewed defendant while he was investigator for Public Defender's office did not require disqualification of solicitor's office where no prejudice shown).² As Applicant has failed to show either deficiency or prejudice, this allegation is dismissed.

Failure to Adequately Cross-Examine Informant

Applicant next alleged counsel was ineffective in failing to adequately cross-examine the confidential informant who testified at trial. Specifically, Applicant alleges counsel should have brought out the fact that the confidential informant was a woman, and that that she was searched before and after the controlled buy by male officers. Applicant's argument appears to be that

² Nor does the purported conflict call the integrity of the entire judicial system into question. Compare State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

male police officers cannot thoroughly search a woman. Applicant has failed to meet his burden to show that counsel's performance was objectively unreasonable. The transaction between Applicant and the confidential informant was caught on video. (State's Exhibit 2). The videotape apparently depicted Applicant holding a bag that was identified as methamphetamine. Tr., Vol. 2, p. 97-98. Additionally, Applicant's testimony at trial was that he bought the drugs while accompanied by the confidential informant, and then gave her a share. Tr. Vol. 3, p. 17-20. Accordingly, to the extent Applicant is alleging his attorney should have argued the confidential informant somehow managed to sneak her own drugs onto the video to frame him, such a theory would have been inconsistent with the video evidence presented at trial *and Applicant's own testimony*.

Applicant has also failed to show prejudice. In light of the above referenced evidence, there was already ample direct evidence from which the jury could find Applicant possessed the drugs and intended to distribute them. As a result, Applicant has failed to meet his burden to prove that counsel's alleged deficiency calls into question the outcome of the proceeding.

Failure to Bring Out that Applicant was a User, Not a Seller

Applicant also alleged counsel was ineffective for ignoring at trial that he was a user instead of a seller. Counsel testified at the evidentiary hearing that Applicant was no doubt a user, and acted as a "go-between" to accommodate the sale. However, counsel said there was no such charge for meth. Further, after reviewing the record, this Court notes that trial counsel argued during his closing statements that Applicant was an addict and not a dealer. Tr. Vol. 3.,

p. 62-65.³ There is therefore no factual basis for this allegation, and Applicant has failed to meet his burden. As a result, this allegation is denied.

Alleged Improper Enhancement

Applicant also alleged his sentence was unlawfully enhanced as a result of prosecutorial misconduct. This allegation is factually refuted by the record. An offense is considered a second or subsequent offense if for an offense involving a controlled substance other than marijuana pursuant to this article, the offender has been convicted within the previous ten years of a first violation of a controlled substance offense provision, other than a marijuana offense provision, of this article or of another state or federal statute relating to narcotic drugs, depressants, stimulants, or hallucinogenic drugs. S.C. Code Ann. § 44-53-470 (2010). The record reflects that Applicant had a certified conviction for possession of methamphetamine (indictment number 2003-GS-37-1223). He was sentenced for that offense on December 15, 2004. Tr. (Day 3) p. 85, l. 1-10. Applicant was therefore eligible for enhancement. This allegation is denied and dismissed.

Failure to Object to Indictment

Applicant alleged he was prejudiced by counsel's failure to object to the indictment, which had no True Bill stamp. Applicant has failed to show deficiency or prejudice. Counsel testified that the clerk had the indictments listed as "true bill." This is corroborated by the face of the indictment, which does indeed indicate that it was True Billed. In any event, Applicant has not present any evidence which would indicate that he was prejudiced by an indictment that

³ Counsel told the jury "Yeah, it did happen. It sure did. But it will be up to you to determine whether or not his intent at that time was to sell drugs to be a dealer or to be a user." Tr. Vol. 3., p. 65, l. 17-19.

was not true billed, as is his burden in this forum. This allegation is therefore denied and dismissed.

Failure to file a Direct Appeal

Finally, Applicant has alleged counsel was ineffective in failing to file a direct appeal. This Court agrees, and grants relief pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Absent extraordinary circumstances, there is no constitutional requirement that a defendant be informed of a right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224-25 670 S.E.2d 373, 374 (2008) (citing Roe v. Flores-Ortega, 528 U.S. 470, 471 (2000)). Our courts have held that when a defendant reasonably expressed an interest in an appeal or where there is reason to think that a rational defendant would want to appeal are such circumstances that would require informing a defendant of the right to appeal from a guilty plea. Id. "The better practice is for counsel routinely to consult with defendant about an appeal," even though there is no constitutional requirement to do so in the absence of extraordinary circumstances. Flores-Ortega, at 472. In addition to showing that counsel's deficient performance deprived defendant of the right to appeal, the defendant must show that but for counsel's failure to consult with defendant about an appeal, he would have timely appealed. Id. If a defendant has not knowingly and intelligently waived his right to appeal, he is entitled to a belated appeal. Turner, at 374.

The Court finds that Defense Counsel never filed the appeal that Applicant requested. Based on Applicant's PCR application and testimony at the evidentiary hearing, it is apparent that he both requested an appeal and intended to appeal his conviction. Defense Counsel admitted at the hearing that he could have missed Applicant's request for an appeal. This Court

finds that Applicant did not knowingly and intelligently waive his right to appeal and is therefore entitled to a belated appeal.

ALL OTHER ALLEGATIONS

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

[Signature follows]


CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations beyond denial of his right to the effective assistance of counsel for failure to file a direct appeal. Counsel was not deficient in any other manner, nor was Applicant prejudiced by the remainder of counsel's representation. Therefore, each of Applicant's other allegations must be denied and dismissed with prejudice. This Court, however, concludes Applicant is entitled to a new appeal as a result of appellate counsel's deficient performance.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief be denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, Applicant must file a notice of appeal to secure the appropriate review of Applicant's conviction. Counsel and the Applicant are directed to Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986) and South Carolina Appellate Court Rule 227(g) for the appropriate procedure.

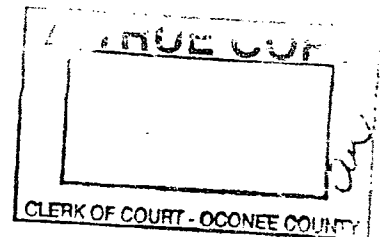
AND IT IS SO ORDERED this 26th day of October, 2016.



EDGAR W. DICKSON
Presiding Judge
Tenth Judicial Circuit

Orangeburg, South Carolina

CLERK OF COURT - OCONEE COUNTY, SC
OCT 26 10 10 30



STATE OF SOUTH CAROLINA) IN THE COURT OF (Select one.)
 COUNTY OF OCONEE) COMMON PLEAS FAMILY COURT
) TENTH JUDICIAL CIRCUIT
 Gregory Lee Murphy,) CASE NO.: 2013-CP-37-812
 Plaintiff(s),) APPOINTMENT OF COUNSEL OR GAL
 -vs-) (Select one.)
 State of South Carolina,) ORDER
 Defendant(s),) AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

- | | | |
|--|--|--|
| <input checked="" type="checkbox"/> Post-Conviction Relief (PCR)/habeas case | <input type="checkbox"/> Adoption | <input type="checkbox"/> Juvenile |
| <input type="checkbox"/> SVP case | <input type="checkbox"/> Custody and/or Visitation | <input type="checkbox"/> Abuse and Neglect |
| <input type="checkbox"/> Minor Name Change | <input type="checkbox"/> Other: | |

It appears that Gregory Lee Murphy, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- counsel/guardian ad litem has not yet been appointed by the court: therefore, an appointment for counsel/guardian ad litem is necessary.
- counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____
- counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- court appointed counsel has obtained _____, Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- Other: _____
- counsel lead counsel (if capital PCR case) guardian ad litem

Therefore, it is ordered that _____ hereby is appointed as (Select one.)
 for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.
 (If Death Penalty PCR Case) It is further ordered that HUGH WELBORN, P.O. BOX 173,
 ANDERSON, S. C. 29622, Esquire, is hereby appointed as second counsel in this capital PCR case.
 The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 22 DAY OF November, 2013.

 Circuit Judge Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

Hugh W. Welborn

Attorney at Law
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Office Telephone:
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December 2, 2016

South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589

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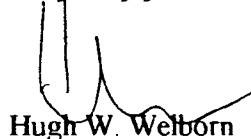
In RE: Gregory L. Murphy vs. State of South Carolina
Case #: 2013-CP-37-812

S.C. SUPREME COURT

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,



Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Attorney General
Client

Hugh W. Welborn

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December 2, 2016

Walt Whitmire
Assistant to Attorney General
P. O. Box 11549
Columbia, South Carolina 29211-1549

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S.C. SUPREME COURT

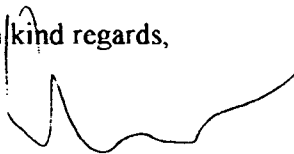
In RE: Gregory L. Murphy vs. State of South Carolina
Case #: 2013-CP-37-812

Dear Walt:

Please find enclosed herewith a copy of the Appellant's Notice of Appeal, Proof of Service and Order of Dismissal in connection with the foregoing matter. I also enclose copies of correspondence to the Appellate Defense Office and the Supreme Court. I have also forwarded copies of all documents to my client.

If you have any questions, please do not hesitate to contact my office.

With kind regards,



Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Appellate Defense

Hugh W. Welborn

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December 2, 2016

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S.C. SUPREME COURT

Gregory L. Murphy, #355966
Manning Correctional Institution
502 Beckman Drive
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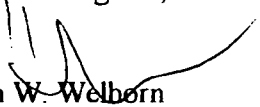
In RE: Gregory L. Murphy vs. State of South Carolina
Case #: 2013-CP-37-812

Dear Mr. Murphy:

In connection with the foregoing matter, please find enclosed herewith copies of the Notice of Appeal and Proof of Service. I have also enclosed a copy of the Order of Dismissal in the above-referenced matter. These copies are for your records. This concludes my representation of you in this matter.

The South Carolina Appellate Defense Office will now assign an attorney to represent you in the Appeal. Any questions you may have should be directed to the Appellate Defense Office.

With kind regards,


Hugh W. Welborn

HWW/sba
Enclosures

Hugh W. Welborn

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December 2, 2016

South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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DEC -6 2016

In RE: Gregory L. Murphy vs. State of South Carolina
Case #: 2013-CP-37-812

S.C. SUPREME COURT

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,

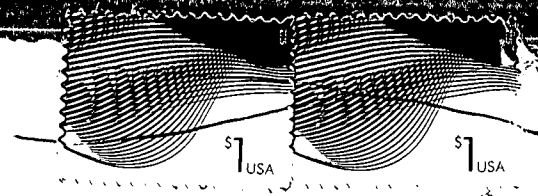


Hugh W. Welborn

HWW/sba
Enclosures

cc: Office of the Appellate Defense
Office of the Attorney General
Client

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South Carolina Supreme Court
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